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No. _____

In The

Supreme Court of the United States

October Term, 1995

RESTLAND FUNERAL HOME, INC., ET AL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Attorney General have the power to bring a civil penalties suit under the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45(m)(1)(A), after the Attorney General's 45-day action period in § 56(a)(1)(B) has expired?

2. May the Attorney General bypass the provision in the FTC Act that suit may be brought by the FTC in its own name by its own attorneys after the Attorney General fails to act within the 45-day period, by designating an FTC staff attorney as "of counsel"?

PARTIES

The parties herein are the Plaintiff/Respondent, the United States of America, and the Defendants/Petitioners Restland Funeral Home, Inc., Laurel Land Funeral Home, Inc., Singing Hills Funeral Home, Inc., Bluebonnet Hills Funeral Home, Inc., and Laurel Land Funeral Home of Fort Worth, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Restland Funeral Home, Inc., Laurel Land Funeral Home, Inc., Singing Hills Funeral Home, Inc., Bluebonnet Hills Funeral Home, Inc., and Laurel Land Funeral Home of Fort Worth, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on May 2, 1995.

OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is reported at *United States v. Restland Funeral Home, Inc.*, 51 F.3d 56 (5th Cir. 1995) (the "Fifth Circuit opinion") and is included in the Appendix to this Petition, beginning at page A-1. The order on petition for rehearing entered July 6, 1995, is included in the Appendix, beginning at page B-1. The order on motion for clarification entered July 12, 1995, is included in the Appendix, beginning at page C-1. The unpublished Memorandum Order of United States District Judge A. Joe Fish filed August 4, 1994, is included in the Appendix, beginning at page D-1. The Judgment of United States District Judge A. Joe Fish is included in the Appendix, beginning at page E-1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 2, 1995. Appendix A-1. The

order denying petition for rehearing was entered on July 6, 1995. Appendix B-1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit had jurisdiction over this proceeding under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

15 U.S.C.A. § 56 of the Federal Trade Commission Act ("FTC Act") provides in pertinent part:

> **§ 56. Commencement, defense, intervention and supervision of litigation and appeal by Commission or Attorney General; procedure for exercise of authority to litigate or appeal; certification by Commission to Attorney General for criminal proceedings**
>
> (a)(1) Except as otherwise provided in paragraph (2) or (3), if –
>
> > (A) before commencing, defending, or intervening in, any civil action involving sections 41 to 46 and 47 to 58 of this title (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

. . .

(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action pursuant to paragraph 3(A)(ii).

(5) The provisions of this subsection shall apply notwithstanding chapter 31 of Title 28, or any other provision of law.

28 U.S.C.A. § 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C.A. § 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 U.S.C.A. § 1254 provides, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Portions of Congressional Committee reports and Senate debate relating to the 1975 amendments to the FTC Act are included in the Appendix, beginning at page F-1.

STATEMENT OF THE CASE

1. Introduction.

Power struggles between the Justice Department and federal agencies are legion. They have plagued businesses at the mercy of federal regulators for decades. In 1995, the Fifth Circuit dealt nearly thirty years of federal circuit precedent and legislative history a powerful blow, by fashioning an explosive weapon for the Attorney General's arsenal. The Fifth Circuit dropped a bomb by allowing the Attorney General to claim that her "general" power to litigate in the name of the United States overpowered an express directive in the FTC Act that civil penalties litigation be brought by the FTC acting in its own name by its own attorneys without Attorney General supervision.

The Fifth Circuit opinion is squarely in conflict with published Second and Eighth Circuit decisions, Supreme Court decisions, and the language and legislative history of the FTC Act. The Second and Eighth Circuits have interpreted the FTC Act to preclude the FTC and Attorney General from exercising concurrent powers of enforcement. *United States v. St. Regis Paper Co.*, 355 F.2d 688 (2nd Cir. 1966); *United States v. J.B. Williams Co.*, 498 F.2d 414 (2nd Cir. 1974); *Top Value Meats, Inc. v. FTC*, 586 F.2d 1275 (8th Cir. 1978). These circuits have likewise held that strict compliance by the FTC and Attorney General with the procedural requirements of § 56(a) is a jurisdictional prerequisite to suit. The United States Supreme Court has also required the Attorney General to comply strictly with the procedural requirements of a civil statute as a prerequisite to suit. *United States v. Zucca*, 351 U.S. 91

(1956). In contrast, the Fifth Circuit opinion gives the Attorney General concurrent enforcement power with the FTC over civil penalties cases and excuses the Attorney General from strict compliance with the procedural requirements of the FTC Act.

The legislative history of the 1975 amendments to the FTC Act clearly reflects that the bill's sponsors intended the 45-day period in § 56(a)(1) to be a deadline for the Attorney General to file suit, failing which the FTC could act on its own without the Attorney General's supervision or involvement. The 1975 amendments also added § 56(a)(5), which states § 56(a) applies notwithstanding the Attorney General's general litigating authority under Title 28, chapter 31, containing §§ 516 and 519. The Fifth Circuit opinion ignored the legislative history; failed to address § 56(a)(5); rendered five parts of the statute void or superfluous; and negated the power of Congress to create exceptions to the Attorney General's supervision of litigation under §§ 516 and 519. In doing so, the Fifth Circuit violated the fundamental precepts confirmed by the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868, 876 (1991), that courts should be reluctant to render statutory provisions superfluous. The Fifth Circuit opinion has designed a powerful offensive weapon for the Attorney General by judicially blasting § 56(a)(5) and the "except as otherwise authorized" proviso in §§ 516 and 519 out of the United States Code.

2. Procedural History.

On August 22, 1991, the FTC, through Chairman Janet Steiger, sent a letter to the acting Attorney General, advising him that the FTC was giving written notification

of its intention to commence a civil penalties action against Petitioners under the FTC Act. In her letter, Chairman Steiger stated, "If it is your decision not to file this suit **within the next forty-five days**, please be advised that the Commission, in accordance with Section 16(a)(1) of the FTC Act [15 U.S.C. § 56(a)(1)], intends to file this action in its own name and by its own attorneys. In that event, please return the enclosures." (Emphasis supplied.) R. 8, p. 1920.[1] The enclosures included the original complaint drafted in the name of the United States, showing FTC staff attorneys as "of counsel." R. 1, pp. 1-8; R. 8, pp. 1920, 1872.

Instead of returning the complaint and evidentiary materials to the FTC, on December 3, 1991, nearly two months after the 45-day deadline expired, the Attorney General filed the original complaint forwarded by Chairman Steiger.[2] R. 1, pp. 1-8. At that point, the FTC's designation of its staff attorneys as "of counsel" to the United States was stale.

Thereafter, the case became mired in a fact-finding quagmire. The Assistant United States Attorney used the designation of FTC attorneys as "of counsel" as a means to cloak the knowledge of the entire FTC with claims of

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[1] References to the record will be in the form of "R.1, p. 1" which refers to volume one, page one of the record on appeal.

[2] The complaint alleged violations of the preventive requirements of the FTC Funeral Rule, 16 C.F.R. §§ 453.2-453.5. The complaint alleged no violations of the sections of the Funeral Rule defining certain acts and practices as unfair or deceptive. The Petitioners had voluntarily complied with an extensive FTC investigation before suit, producing thousands of records to FTC staff. The Petitioners deny the allegations.

privilege. Petitioners served discovery seeking the United States' knowledge of the who, what, where, when and why which supported the broad allegations in the complaint. The United States identified numerous FTC staff members as persons with knowledge of relevant facts, including Thomas Carter and Maridel Morgan. R. 1, pp. 85-87. These are the same FTC staff attorneys whose names appear "of counsel" on the original complaint. R. 1, pp. 1-8. Carter and Morgan gave press interviews about the case after it was filed. R. 3, pp. 579-583. The United States named Carol Jennings, an FTC staff lawyer in Washington, D.C., as its testifying expert, and also named Curtistene McCowan, an FTC staff member, as a fact witness. R. 1, pp. 85-87; R. 5, pp. 1292, 1299-1300.

The Petitioners obtained a court order allowing them to depose the FTC staff identified as persons with knowledge of relevant facts, including Carter, Morgan, and McCowan. R. 3, pp. 584-589. The Assistant United States Attorney interjected hundreds of objections at the depositions, ordering the witnesses not to testify regarding their factual knowledge, on claims of "privilege."[3] R. 5, pp. 1284, 1293-1300. During the deposition of Morgan, who had sworn to interrogatory answers in the case, the Justice Department attorney ordered Morgan not to testify to

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[3] Seven FTC witnesses refused to answer 340 deposition questions, at the direction of the Assistant United States Attorney. R. 5, pp. 1284-1293.

any facts known to her.[4] Similarly, the Assistant United States Attorney ordered McCowan not to testify regarding what knowledge she had of violations allegedly committed by Petitioners, claiming various privileges. R. 5, pp. 1294-1295. After discovery closed, McCowan filed an affidavit purporting to identify thousands of violations, which she had refused to testify about in her deposition. R. 5, pp. 1301-1304, 1310-1316; R. 8, pp. 1845-1846.

The confusion created by the Justice Department's control of the case and directives to FTC witnesses culminated in the deposition of Carter, the FTC Regional Director. Carter refused, at the direction of the Assistant United States Attorney, to answer questions regarding whether the FTC considered itself to be a party to the case. R. 8, pp. 1868-1872. Carter did concede the FTC never determined any amount of penalties it had authorized the Attorney General to seek. R. 5, pp. 1298-1299; R. 8, pp. 1869-1872.

As a by-product of this interagency sword play, Petitioners were wholly thwarted in their efforts to get at the

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[4] The Assistant United States Attorney instructed FTC witness Maridel Morgan not to disclose facts as follows:

Q. What facts do you know which support any of the allegations in the complaint against Restland Funeral Home, Inc.?

MS. McGOVERN [Assistant United States Attorney]: I would note for the record that the witness has no complaint. The United States has a complaint against the Defendants. With respect to the factual information sought from this witness, the witness is instructed not to – that – excuse me, that a privilege is claimed. An objection is made, and **the witness is instructed not to disclose any factual information.** R. 6, pp. 1339-1340.

factual underpinnings of the case. By the close of discovery, the United States had never answered the discovery seeking the identity of each violation committed, by whom, and when.

Although the docket sheet erroneously listed the FTC as a party, the FTC never intervened in the case. While the Fifth Circuit thought it relevant that FTC staff received copies of pleadings, after a Motion for Contempt was filed by Petitioners on August 10, 1993, the Assistant United States Attorney directed Petitioners to cease sending copies of any pleadings to persons identified on the original complaint as "of counsel," including Carter. *See* Appellees' Petition for Rehearing and Motion for Clarification, Exhibit A, filed June 16, 1995.

In sum, the Justice Department took control of the disclosure of all information in the case. The designation of FTC staff as "of counsel" was repeatedly used by the United States as a shield to prevent meaningful discovery from FTC witnesses on the grounds of "privilege."

In a brief filed on April 9, 1993, Petitioners called the district court's attention to the jurisdictional problems with the Justice Department pursuing the case, due to the Attorney General's suspected failure to follow the procedural requirements of the FTC Act. R. 4, pp. 885-886. The FTC took no action to correct the jurisdictional problem.

During court-ordered mediation, the Assistant United States Attorney originally refused to participate with settlement authority. This prompted the district court to enter a clarifying order compelling the United States to do so. R. 6, pp. 1417-1419. It was not clear on

whose behalf the Assistant United States Attorney was participating, and to what extent, if any, the FTC was willing to be bound by whatever terms the United States proposed. Mediation was not fruitful.

As the quagmire deepened, on December 3, 1993, Petitioners filed their Motion to Dismiss for lack of jurisdiction due to the Attorney General's failure to follow the procedural mandates of the FTC Act. R. 8, p. 1847. In response, the United States produced Chairman Steiger's letter, previously withheld under a claim of privilege. The letter frankly disclosed: (1) the Justice Department missed its deadline for filing suit, and (2) the FTC Chairman had directed the Attorney General to return the complaint after 45 days if not filed, because the FTC intended to file suit in its own name by its own attorneys.

The district court dismissed the case, holding that the Attorney General did not have authority to file the suit after the 45-day deadline. (Appendix D-1 – D-6). The Fifth Circuit opinion reversing the district court is based on two erroneous premises: (1) because FTC staff attorneys appeared "of counsel" on a pleading, the FTC was "monitoring" the litigation and the FTC did not need to sue in its own name, and (2) in any event, the Attorney General had the power to sue under §§ 516 and 519. On June 16, 1995, Petitioners filed their Motion for Rehearing, referring the court to § 56(a)(5), and attempting to dispel the court's erroneous conclusion that the FTC was in fact a party by virtue of the "of counsel" designation. The court denied the motion on July 6, 1995.

REASONS FOR GRANTING CERTIORARI

A. INTRODUCTION.

This case involves issues of substantial importance regarding which agency (the FTC or the Justice Department) has control over a civil penalties action under the FTC Act. The Courts of Appeals for the Second and Eighth Circuits require both the FTC and Attorney General to strictly adhere to the procedural requirements of the FTC Act in order to prohibit both agencies from exercising dual control under the FTC Act. The failure to follow these procedures deprives the court of jurisdiction over the case.

On a larger scale, the opinion of the Fifth Circuit creates an aberration in the fundamental rules of statutory interpretation, which apply both to the FTC Act, and to the authority of the Attorney General *vis a vis* all other agencies under §§ 516 and 519. This case is not an isolated incident. Another district court has cited the Fifth Circuit opinion in denying a motion to dismiss an FTC Act case brought by the Attorney General after the 45-day deadline. *In re Dahlberg and the FTC*, No. 4-94-CV-165, slip op. at 1-2 (D. Minn. May 25, 1995). Consequently, the case has implications in every instance in which the Justice Department demands or presumes to take power which Congress has conferred on another agency.

B. EFFECT OF THE FIFTH CIRCUIT OPINION.

The deleterious effects of the Fifth Circuit opinion are three-fold. First, with regard to the FTC Act itself, the Fifth Circuit has resurrected the ghost of dual surveillance and enforcement expressly rejected by the Second

and Eighth Circuits as an unreasonable and unfair application of the FTC Act. A private party subject to FTC Act scrutiny has no assurance that resolution of a matter or negotiation with the FTC will bar yet another action by the Attorney General arising from the same subject; nor will a private party be spared the possibility of two suits by two agencies in two forums for two sets of penalties under the same law arising from the same facts. Further, the Fifth Circuit opinion eviscerates the meaning of the notice and consultation period between the FTC and Attorney General under § 56(a)(1). The 45-day period is irrelevant if the Attorney General may file suit at any time thereafter, creating uncertainty for both the FTC and private businesses, which do not know if and when the Attorney General will act.

Second, the Fifth Circuit opens a door closed by Congress in the 1975 amendments to the FTC Act, by allowing the Attorney General to ***presume*** it has ***concurrent*** authority with a federal agency which has unequivocally been granted power to act on its own. The Fifth Circuit opinion opens a very wide door through which the Justice Department may grab at powers never intended by Congress.

Third, the Fifth Circuit opinion turns general principles of statutory interpretation upside down. The opinion closes its eyes to Congress' express mandate that the FTC Act, and not Title 28, Chapter 31, would determine **who** had authority over **which** court actions and **when**. On appeal, the Justice Department cited §§ 516 and 519 for the first time as the basis for its power; the Fifth Circuit ignored Congress' rejection of those sections in § 56(a)(5).

The opinion stands as an open invitation for the Justice Department to thwart Congressional directives.

C. THE FIFTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND AND EIGHTH CIRCUITS BECAUSE IT RECOGNIZES NO LIMITATION ON THE ATTORNEY GENERAL'S AUTHORITY TO CONDUCT LITIGATION

1. Second Circuit.

The Second Circuit in *St. Regis Paper Co.* reviewed the roles of the FTC and the Attorney General under the FTC Act, and determined that Congress delineated authority between the agencies to prevent a system of dual enforcement. 355 F.2d 688, 693-700 (2nd Cir. 1966). The Fifth Circuit opinion is in conflict with the Second Circuit's decision in *St. Regis Paper Co.* on two points: (1) *St. Regis Paper Co.* prohibits concurrent enforcement of the FTC Act; and (2) *St. Regis Paper Co.* interprets the grant of litigating authority to the FTC as an exception and bar to the Attorney General's litigating power under Title 28, chapter 31.

First, in *St. Regis Paper Co.*, the United States sought to enforce an FTC cease and desist order by suing for civil penalties, pursuant to § 56. At that time, § 56 provided that the Attorney General could commence a suit to recover civil penalties for a violation of an FTC cease and desist order *after* the FTC certified facts to the Attorney

General.[5] The Attorney General proceeded with the suit without receiving certification from the FTC of the facts constituting violations of the Act. As a result, the Second Circuit dismissed the case for lack of subject matter jurisdiction due to the Attorney General's failure to await certification of the case by the FTC. *Id.* at 699-700.

The Second Circuit recognized the double jeopardy problem created by the Attorney General's exercising concurrent enforcement of the FTC Act, along with the FTC. In dismissing the case, the Second Circuit interpreted the FTC Act to relieve businesses of uncertainty and indicate a clear path upon which they can travel without anxiety, rather than imposing multiple layers of bureaucratic oversight. *Id.* at 697. The Second Circuit described the rationale for barring simultaneous enforcement of the FTC Act as follows:

> Were the Attorney General permitted to concurrently review with the FTC the validity of the business practices of those subject to the Commission's orders, the value of the Commission's practices and rules designed to promote voluntary compliance and avoid the rigors of litigation would be greatly impaired. No respondent could ever reach an understanding with the Commission without also seeking the approval of the Attorney General. In addition, a system of dual surveillance and enforcement would

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[5] At that time, the FTC did not have its current rulemaking authority, and 15 U.S.C. § 45(m)(1)(A), allowing for civil penalties actions to be brought by the FTC for violations of rules defining unfair or deceptive trade practices, was not enacted until 1975. The complaint in the present case is for civil penalties under 15 U.S.C. § 45 (m)(1)(A). R. 1, pp. 1-8.

> unjustly hamper those subject to orders by creating uncertainty and doubt as to what course of action to follow. Congress could not have intended such a result because reason and experience dictate that businessmen operating under the terms of a Commission order "should be relieved insofar as possible of uncertainties with regard 'to their enterprises and investments and a clear path indicated which they can travel without anxiety.' "

Id. at 697 (quoting Note, 38 Ind. L.J. 377, 379 (1963)).[6]

Second, the Second Circuit held the FTC Act's grant of power to the FTC was an exception to the Attorney

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[6] The court further explained:

> Thus, it is reasonable to conclude, along with the appellant, that Section 16 [15 U.S.C. § 56] was designed to protect persons and businesses subject to the Commission's orders from unwarranted penalty suits and to provide them, in conjunction with the judiciary, with the specialized experienced guidance of the Commission.
>
> . . .
>
> Additionally, a system of dual surveillance and enforcement of FTC orders would in all probability jeopardize the Commission's vitally important consent order procedure, . . . FTC Rules of Practice § 2.1-2.4, 16 C.F.R. § 2.1-2.4 (Supp. 1965), since under such a system cease and desist orders would not provide reliable guidance. Businessmen could hardly be expected to consent to orders to cease and desist knowing that the Attorney General could disregard the Commission's interpretation of the negotiated order and invoke Section 5(*l*) [15 U.S.C. § 45(l)] on his own motion.

St. Regis Paper Co., 335 F.2d at 697-98. (footnotes omitted).

General's authority under Title 28. The Second Circuit succinctly stated the rule as follows:

> The general duty of the United States Attorneys to conduct litigation on behalf of the United States can be invoked only in the absence of statutory directions delineating the circumstances under which civil actions can be instituted, i.e., "except as otherwise provided by law . . . . "

Id. at 695. The court regarded § 56 as an exception to Title 28 which barred the Attorney General from proceeding.

Here, the Fifth Circuit recognizes no limits on the Attorney General's powers. The Fifth Circuit awkwardly attempts to distinguish *St. Regis Paper Co.* by limiting its holding solely to the potential problems associated with the dual determination of whether to sue, stating, "Thus, *St. Regis Paper Co.* is not on point regarding what happens *after* there has already been FTC certification plus the 45 day post-notification period." *Restland Funeral Home, Inc.*, 51 F.3d at 58, n.3. The Fifth Circuit's attempt to distinguish *St. Regis Paper Co.* must fail. Since *St. Regis Paper Co.* was decided, Congress amended the FTC Act in 1975 to expand the powers of the FTC and restrict those of the Attorney General. Section 56 was amended to add § 56(a)(5), which precludes the application of the Attorney General's litigating powers under §§ 516 and 519. By allowing the Attorney General to bring suit after the 45-day deadline, the Fifth Circuit opinion has judicially repealed § 56(a)(5).

Further, the rationale of *St. Regis Paper Co.* applies equally to the delineation of enforcement authority after the 45-day deadline. The Second Circuit specifically held

that the FTC Act was designed to prevent a "system of dual surveillance and **enforcement**." The Fifth Circuit's decision not only encourages an unfair system of dual enforcement, but also thwarts businesses, such as Petitioners, who voluntarily comply with FTC investigations in the hope of prompt resolution of the matter. The Fifth Circuit opinion would allow the Justice Department to reject or bypass the terms of a resolution reached with the FTC after the 45-day deadline.

The *St. Regis Paper Co.* decision was embraced in *United States v. J.B. Williams Co.*, 498 F.2d 414, 437 (2nd Cir. 1974). The Second Circuit held that where Congress had given to the FTC the task of determining when and what penalties should be sought, the Attorney General was without authority to do so. *Id.* As the FTC "took seriously its responsibilities concerning the amount of the penalty," the Attorney General "was without authority" to claim an amount which differed from the amount the FTC had determined should be sought when it certified the case to the Attorney General. *Id.*

Notably, the FTC Act does not state in black and white, "The Attorney General may not determine the penalty to be sought," nor does it state that the "FTC may not institute suit until the certification period has expired." Nonetheless, in both *St. Regis Paper Co.* and *J.B. Williams Co.*, the Second Circuit concluded that the grant of power to the FTC constituted a denial of that same power to the Attorney General. These holdings are in direct conflict with the opinion of the Fifth Circuit, which presumes **either or both** the Attorney General and FTC may sue after the 45th day. The Fifth Circuit opinion does not address *J.B. Williams Co.* in any way.

2. Eighth Circuit.

The Eighth Circuit was the first to consider the effect of the 1975 amendments to the FTC Act. These amendments, as discussed *infra* in section E, greatly expanded the power of the FTC and restricted the Attorney General's role. In *Top Value Meats, Inc. v. FTC*, 586 F.2d 1275, 1282 (8th Cir. 1978), the FTC failed to tender the case to the Attorney General, thereby failing to commence the 45-day period under the FTC Act. Citing *St. Regis Paper Co.*, the Eighth Circuit held that the statutory framework by which Congress determines which party may sue to enforce the FTC Act is jurisdictional. *Id.* at 1282. Both the FTC and the Attorney General argued that although there was no literal compliance with the statute, "the Justice Department was well aware of what was going on," and "the counterclaims were prosecuted jointly by counsel for the Commission and for the Department." *Id.* The Eighth Circuit rejected these excuses:

> The trouble with that argument is that we are concerned here with statutory penalties, and statutes imposing such penalties should be construed with some strictness. We think that when Congress imposes penalties and prescribes the means whereby and the condition under which those penalties are to be collected, there must be strict compliance with the procedures prescribed by Congress.
>
> . . .
>
> In our view, where dealings between the government or one of its agencies, on the one hand, and individuals or corporations on the other hand, are involved, the obligation to "turn square corners" or to "turn corners squarely" is

> not unilateral. It rests on the government as well as on the individual with whom or the entity with which the government has dealt.

Id. at 1282-83. The Eighth Circuit dismissed the case because the FTC never gave the Attorney General 45 days to decide whether to bring suit in the name of the United States. Therefore, the FTC could not bring the suit in its own name.

The Fifth Circuit opinion allows the Attorney General to proceed in the name of the United States after the 45-day deadline. The Fifth Circuit presumed the FTC was "monitoring" the case because FTC staff appeared "of counsel." In direct contrast, the Eighth Circuit held that the involvement of Justice Department attorneys helping the FTC prosecute its case was no excuse for the FTC's failure to give the Justice Department notice and the opportunity to bring those claims in the name of the United States within the 45-day period. Likewise, FTC staff attorneys helping the Justice Department does not excuse the failure of the FTC to file suit in its own name in this case. The Eighth Circuit recognized the difference between suits brought by the FTC and suits brought by the United States. The court rejected the contention that the requirements of § 56(a)(1) were satisfied by the Justice Department's "being aware" of the case and lending an attorney or two to help the FTC.

The Fifth Circuit has ignored the directive that the case must be brought *in the name of the FTC* and *supervised* by its own attorneys, who have been expressly designated by the FTC for that purpose. There is a fundamental conflict between § 56(a)(1) and § 519 if both the FTC and the Attorney General, with their separate agendas,

budgets, and staffs, are required to *supervise* the same litigation. To whom is a business answerable?

Moreover, FTC staff "participation" in a case, whether "of counsel," as fact witnesses, or as expert witnesses, does not comport with § 56(a). This is particularly true where the Justice Department uses the "of counsel" designation as a discovery weapon to shield the facts, by ordering FTC witnesses not to testify. Accordingly, the Fifth Circuit opinion, which does not discuss *Top Value Meats, Inc.*, conflicts with the Eighth Circuit's mandate that federal agencies "turn square corners" under the FTC Act. The Justice Department must refrain from grasping at powers delegated to the FTC.

D. THE FIFTH CIRCUIT OPINION CONFLICTS WITH SUPREME COURT DECISIONS RECOGNIZING LIMITS ON THE ATTORNEY GENERAL'S STATUTORY AUTHORITY.

Without success, the Attorney General has previously invoked the Justice Department's general litigating powers under Title 28 to either evade the procedures in another statute, or to supply powers *vis a vis* an agency governed by another statute. In *United States v. Zucca*, 351 U.S. 91, 98 (1956), the Supreme Court disposed of the Attorney General's attempt to invoke statutory authority under Title 28 to maintain an action for denaturalization. The Attorney General did not comply with the specific statutory jurisdictional prerequisites to suit under the Immigration and Nationality Act of 1957, 8 U.S.C. § 1451(a). That act required a private citizen to furnish an affidavit of good cause before the Attorney General could

maintain the denaturalization suit. The Attorney General brought a denaturalization suit without furnishing the proper affidavit. The Attorney General argued that the duty imposed on the Attorney General to prosecute civil actions in which the United States is concerned was enough. Rejecting this contention, the Supreme Court held, "We think that the public interest is not served by taking such liberties with a specific statutory requirement designed for the protection of naturalized citizens." *Id.* at 98. Here, the public interest is not served by taking liberties with specific statutory requirements designed to protect businesses from the cross-fire of competing agencies.

Similarly, in *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 12-13 (1972), the Supreme Court refused to permit the Department of Justice to invoke §§ 516 and 519 in order to appeal a decision of the Atomic Energy Commission ("AEC"). The case involved an action by a government contractor to recover on claims arising out of performance of a contract with the AEC. The contractor had reached an agreement with the AEC over payment, and the Attorney General sought to appeal the decision. In rejecting the Attorney General's argument, the Supreme Court held, "That power [in §§ 516 and 519] is pervasive but it does not appear how under the Wunderlich Act it gives the Department of Justice the right to appeal from a decision of the Atomic Energy Commission. Normally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision, not to repudiate it." *S & E Contractors, Inc.*, 406 U.S. at 12. Here, the FTC, through Chairman Steiger, told

the Justice Department to return the case because the FTC had decided to file it in the name of the FTC by its own attorneys, if the Attorney General did not act within 45 days. The Attorney General's duty was to implement that directive, not repudiate it.

Finding that the Attorney General could not invoke §§ 516 and 519, the Court in *S & E Contractors, Inc.* recognized two fundamental principles regarding governmental authority. First, "[a] citizen has the right to expect fair dealing from his government . . . " *Id.* at 10. Moreover, a citizen should not have to "perform the Herculean task of beheading the Hydra in order to obtain justice from his Government." *Id.* at 14. Petitioners have the right to expect fair dealing from their government, not gamesmanship where the stakes are high. Petitioners should not have to behead the Hydra of multi-agency control before obtaining resolution of the case.

The 45-day deadline prevents confusion and protects businesses from unwarranted dual enforcement and bureaucratic oversight. It defines with certainty the path of regulatory enforcement enterprises may travel without anxiety. Prior to the FTC's notification to the Attorney General, a business deals with the FTC on an administrative level. During the 45-day period, it is exclusively the Attorney General's case to bring. After the 45-day period, the case is in the hands of the FTC. The public interest is not served by giving the Attorney General the authority to repudiate or compete with the FTC's authority after 45 days.

E. THE FTC ACT WAS AMENDED IN 1975 TO PREVENT THE VERY PROBLEMS THE FIFTH CIRCUIT OPINION CREATES.

While not necessary to an accurate interpretation of the FTC Act, the "legislative history helps a court understand the context and purpose of a statute." Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 848 (1992). After *St. Regis Paper Co.* was decided, Congress implemented its reasoning in the 1975 amendments to the FTC Act by expanding the power of the FTC and restricting the role of the Attorney General. The 1975 amendments gave the FTC the power to make rules defining unfair and deceptive acts and practices, under § 57b; they gave the FTC litigation power to enforce those rules in § 45(m)(1)(A) and § 56(a)(1). The House committee acknowledged the inevitable problems associated with the two agencies simultaneously prosecuting litigation:

> Your committee believes that litigation on behalf of the United States Government requires coordination through a single department or agency of the United States. To do otherwise would result in hopeless confusion and ofttimes lead to the undesirable result of various departments and agencies of the Federal Government taking conflicting positions on issues of public policy.

See H.R. Rep. No. 1107, 93rd Cong. 2d Sess. (1974) *reprinted in* 1974 U.S.C.C.A.N. 7702, 7733. (Appendix, at F-5).

Prior to the 1975 amendments, § 56 had been amended by the Trans-Alaska Pipeline Act (hereinafter

referred to as the 1973 Amendments). The 1973 amendments to the FTC Act had caused some confusion regarding the respective roles of the FTC and the Attorney General in the enforcement of the FTC Act. Both were battling for control under the statute; however, where two agencies battle for authority, Congress' word is the final determination of who has authority to act. *FTC v. Guignon*, 390 F.2d 323, 330 (8th Cir. 1968) ("fundamental policy considerations concerning possible disagreement between federal agencies are best resolved by legislative action . . . ").

The Justice Department opposed the 1975 amendments because they further abrogated its supervisory role and diminished its power, and cited § 516 as the source of this power. *See* H.R. Rep. No. 1107, 93rd Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7732, 7746. (Appendix, at F-3 – F-4). In contrast, the FTC supported the 1975 Amendments because they centralized and expanded the FTC's enforcement role. *Id.* at 7735. (Appendix, at F-2 – F-3).

In response, Congress clearly and unambiguously limited the Attorney General's powers under §§ 516 and 519 by stating that the provisions of subsection 56(a) (creating the 45-day period and the FTC's independent litigating authority) would apply *notwithstanding* chapter 31 of Title 28, or any other provision of law. § 56(a)(5). Congress rejected the Attorney General's demand for

renewed control.[7] Instead, a 45-day deadline was created for the Attorney General to decide whether to file certain kinds of suits after notification, after which the FTC must bring suit in its own name, if it still chose to sue after consultation with the Attorney General. The statute, in accord with the language of a grant of authority, provides that the FTC "may" institute suit. The FTC is not *required* to do so, because it may, of course, settle or decline to take action at all.

The sponsors to the 1975 amendments, members of the Senate Conference Committee, clearly regarded the 45-day period as a deadline. Senator Frank E. Moss explained that amended § 56 "gives the Attorney General the right to represent the Commission *if he acts within a reasonable period of time.*" 120 Cong. Rec. 40711, 40712 (Dec. 18, 1974) (emphasis supplied). (Appendix, at F-11). Senator Warren G. Magnuson similarly explained that under § 56, the Attorney General "has *45 days to decide* whether he – the Attorney General – will pursue the case. If he decides not to pursue the case, the Commission is free to represent itself in court in those other situations." *Id.* at 40713 (emphasis supplied). (Appendix, at F-11). The

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[7] The Joint Explanatory Statement of the Committee on Conference stated as follows:

> The expansion of traditional litigating authority of the Federal Trade Commission contained in this legislation (Sec. 204) will not continue the process of centralizing the authority of the Attorney General over litigation involving the United States Government.

S. Conf. Rep. No. 1408, 93rd Cong. 2d Sess. (1974) *reprinted in* 1974 U.S.C.C.A.N. 7702, 7770-71. (Appendix, at F-9).

45-day period is a reasonable deadline by which the Attorney General must take action.

The legislative history is a valuable tool to placing a statute in context, even where the statute's meaning is plain. For example, in *S & E Contractors, Inc.*, the Supreme Court reviewed legislative history of the Wunderlich Act wherein Congress had previously rejected the General Accounting Office's ("GAO") request for authority to review decisions of the AEC. The Supreme Court noted that if enacted, the provisions would have invested the GAO with power to upset an administrative decision. Because the House of Representatives had previously rejected this provision, the Supreme Court held, "We cannot, therefore, construe it to give the Comptroller General powers which Congress has plainly denied." 406 U.S. at 11-12.

In like manner, Congress added § 56(a)(5) to foreclose the Justice Department from raising §§ 516 and 519 to bootstrap itself into a position of litigating authority. If at the time of the 1975 amendments, Congress had accepted the Justice Department's argument and intended § 516 to confer dual enforcement authority on the Attorney General after 45 days, it would have replaced the word "notwithstanding" with "in addition to" in § 56(a)(5). The Fifth Circuit opinion ignores the statute's legislative history.

F. THE FIFTH CIRCUIT OPINION CONFLICTS WITH SUPREME COURT AUTHORITY REGARDING FUNDAMENTAL PRINCIPLES OF STATUTORY INTERPRETATION.

The Fifth Circuit's opinion renders much of § 56(a) void and superfluous. The following sections are

irrelevant if the Attorney General can act anytime after 45 days, or the Attorney General can satisfy the FTC's obligation to sue in its own name, by designating the FTC "of counsel" on a complaint filed in the name of the United States:

(1) § 56(a)(1), which authorizes the FTC to bring a civil penalties action *in its own name*, by its own attorneys; and

(2) § 56(a)(1)(A), which creates the 45-day period;

(3) § 56(a)(1)(B), which focuses on the *"failure"* of the Attorney General to act within 45 days;

(4) § 56(a)(4), which shortens the Attorney General's time allowed under a court deadline by half, in order to allow the FTC to assert the claim on its own when a court deadline expires before the 45th day;

(5) § 56(a)(5), which states that § 56(a) applies, *notwithstanding* the Attorney General's general duty to litigate on behalf of the government under Title 28.

Similarly, the phrase "except as otherwise provided by law" in §§ 516 and 519 is also meaningless if Congress can provide in another statute for the FTC to sue, but the Attorney General can still claim power under §§ 516 and 519 to take exactly the same action. If the Fifth Circuit is correct, there are no exceptions to the Attorney General's powers under §§ 516 and 519.

If the 45-day period is not a deadline, and the Attorney General can act at any time after notification, each of these five points in the Act is meaningless. The Fifth

Circuit's decision abrogates a long-standing rule of statutory construction that directs a court not to interpret a statute in a manner that makes a particular provision unnecessary or insignificant. *See Freytag v. Commissioner*, 501 U.S. 868, 876 (1991) (quoting *Pennsylvania Dept. of Welfare v. Davenport*, 495 U.S. 552, 562 (1990)) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment.' "). The Seventh Circuit applied this same principle to recognize Congress' power to reallocate authority among agencies. *See Indianapolis Power and Light v. ICC*, 687 F.2d 1098, 1101-02 (7th Cir. 1982) (holding that provisions of the Staggars Act which gave the ICC the power to regulate rail carrier rate increases "notwithstanding any other provision of this subtitle" deprived state agencies of the power to regulate rate increases under another section of the same act).

The statutory framework applies notwithstanding the Attorney General's limited authority under §§ 516 and 519. The Fifth Circuit pointed to those very sections as conferring authority on the Attorney General to bring suit in the name of the United States – a power *St. Regis Paper Co.* rejected and Congress expressly withheld. The Fifth Circuit has created a nonexistent delegation of authority to the Attorney General and has rendered superfluous § 56(a)(5) and the "except as otherwise provided" language in §§ 516 and 519.

CONCLUSION

If the decision of the Fifth Circuit is allowed to stand, there will be two layers of bureaucratic oversight embodying the dual simultaneous enforcement system rejected by the Second and Eighth Circuits, and by Congress. The Fifth Circuit's opinion creates enormous practical problems with businesses attempting to comply with government regulations. The Fifth Circuit opinion will be routinely brandished by the Attorney General to seize power which Congress intended another agency to exercise. As a result, private citizens and business will be caught in the cross-fire of interagency warfare.

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be used to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Submitted October 4, 1995

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

RESTLAND FUNERAL HOME,
INC., a corporation, et al.,
Defendants-Appellees.

No. 94-10908.

United States Court of Appeals,
Fifth Circuit.

May 2, 1995.

Attorney General commenced action on behalf of the United States against five funeral homes under the Federal Trade Commission Act (FTCA), for alleged violation of industry-wide rule regulating funeral industry. The United States District Court for the Northern District of Texas, A. Joe Fish, J., dismissed suit for lack of subject matter jurisdiction, finding that, after 45-day reservation of authority for Attorney General to file suit expired, Federal Trade Commission (FTC) had exclusive authority to bring suit. The United States appealed. The Court of Appeals, Stewart, Circuit Judge, held that Attorney General could commence suit after expiration of 45-day period under supervision of FTC.

Reversed and remanded.

Deborah Ruth Kant, Barbara Biddle, Dept. of Justice, Appellate Staff, Washington, DC, Katherine McGovern, Asst. U.S. Atty., Paul Coggins, U.S. Atty., Dallas, TX, for appellant.

Patricia Seifert, Patrick O. Strauss, Hubert Crouch, III, Crouch & Hallett, Dallas, TX, for appellees.

Appeal from United States District Court for the Northern District of Texas.

Before JONES, DUHÉ and STEWART, Circuit Judges.

STEWART, Circuit Judge:

The sole issue presented in this appeal is whether the authority to file suit, granted to the *Federal Trade Commission* (FTC) by 15 U.S.C.S. Sec. 56(a)(1), is exclusive such that only the FTC (*and not the Attorney General*) may file suit after the 15 U.S.C.S. Sec. 56(a)(1)(B) 45 day period. For the following reasons, we conclude that Sec. 56(a)(1) grants the FTC supervisory authority, but does not *bar* the Attorney General from filing suit after the 45 day period.

FACTS

In accordance with 15 U.S.C.S. Sec. 56(a), the Federal Trade Commission (hereinafter, "the FTC") gave the Attorney General written notification on August 22, 1991 of a contemplated suit against five Texas funeral homes. On December 3, 1991, the United States, through the Attorney General, filed suit against the five funeral homes[1] under the Federal Trade Commission Act (FTC Act), alleging violations of the "Funeral Rule", an industry-wide rule which regulates the funeral industry. The

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[1] The five funeral homes are: Restland Funeral Home, Inc.; Laurel Land Funeral Home, Inc.; Singing Hills Funeral Home, Inc.; Bluebonnet Hills Funeral Home, Inc.; and Laurel Land Funeral Home of Fort Worth, Inc.

Complaint for Civil Penalties, Injunctive, and Other Relief begins as follows:

> Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("Commission"), for its complaint alleges. . . .

The district court found that, after the 45 day reservation of authority for the Attorney General to file suit has expired, 15 U.S.C.S. Sec. 56(a)(1) grants *exclusive* authority to the FTC to bring suit for alleged violations of the FTC Act. The district court then dismissed the suit for lack of subject matter jurisdiction. The United States (Attorney General/Department of Justice, hereinafter referred to as "the Government") appeals asserting that, after the 45 day period, the Attorney General and the FTC have *concurrent* authority to institute suit. We agree.

DISCUSSION

The appellees contend that the district court correctly found that it had no subject matter jurisdiction because the suit against them was filed by the Attorney General rather than the FTC and was filed more than 45 days after the FTC gave notice to the Attorney General.

The conduct and supervision of litigation is reserved to the Attorney General, except as otherwise authorized by law. 28 U.S.C.S. Secs. 516 and 519. The FTC's authority to file suit and supervise litigation is granted by 15 U.S.C.S. Sec. 56(a)(1) as follows:

> Except as otherwise provided . . . , if –
>
> (A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and
>
> (B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;
>
> the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

An exception to the Title 28 grant of authority to the Attorney General could mean either that an agency "may" exercise one or more of these litigation rights, or that the agency "shall have exclusive authority" to exercise one or more of these litigation rights. Congress made this distinction by using the "may" language of 15 U.S.C.S. Sec. 56(a)(1) and the "shall have exclusive authority" language in 15 U.S.C.S. Sec. 56(a)(2).[2]

---

[2] Section 56(a)(2) states that,

> Except as otherwise provided . . . , in any civil action –
>
> (A) under section 13 of this Act [15 U.S.C.S. Sec. 53] (relating to injunctive relief);

In 15 U.S.C.S. Sec. 56(a)(1), Congress gives the FTC the right to supervise and intervene in, as well as to file, civil penalties suits. This grant of supervision authority (after the 45 day period) to the FTC is an exception to the 28 U.S.C.S. Secs. 516 and 519 authority, but does not constitute a Congressional mandate that bars the Attorney General from filing suit under supervision of the FTC. We conclude that 15 U.S.C.S. Sec. 56(a)(1) gives the FTC the post-45-day-period-ability to monitor the litigation, without regard to whether suit is filed by the FTC or by the Attorney General.[3]

> (B) under section 19 of this Act [15 U.S.C.S. Sec. 57b] (relating to consumer redress);
> (C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 5 of this Act [15 U.S.C.S. Sec. 45]; or
> (D) under the second paragraph of section 9 of this Act [15 U.S.C.S. Sec. 49] (relating to enforcement of a subpena) [sic] and under the fourth paragraph of such section (relating to a compliance with section 6 of this Act [15 U.S.C.S. Sec. 46];
>
> the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

[3] We are not persuaded by the appellees' argument that the instant facts fall within the "dual surveillance and enforcement"

The instant complaint states that notification and authorization were given *to* the Attorney General *by* the FTC. The name and address of an FTC attorney is typed in as "Of Counsel" below the signatures on the complaint.[4] A number of the pleadings show that the defendants sent a copy to the FTC. Similarly, a number of the plaintiff's pleadings list the FTC attorney as "Of Counsel". The FTC is listed as a plaintiff on the docket sheet, and copies of the court's orders have been forwarded to the FTC just as they were forwarded to the parties.

---

language of *United States v. St. Regis Paper Co.*, 355 F.2d 688, 692 (2nd Cir.1966). Under the FTC Act, "the duty and responsibility for determining what business procedures fall within the purview of Section 5 and for determining whether cease and desist orders issued to eliminate the anti-competitive effects of these practices have been complied with or violated was delegated solely to the FTC." *Id.* at 693. The *St. Regis Paper Co.* "dual surveillance and enforcement" language, which appellees quote in support of the district court judgment, addresses the potential problem of dual determination of whether to sue, i.e., the pre-notification process during which the existence and extent of violations are determined. In other words, *St. Regis Paper Co.* indicates that it is unfair for both the Attorney General and the FTC to determine *what constitutes* a violation, because it is solely the FTC's role to determine policy under the FTC Act. Thus, *St. Regis Paper Co.* is not on point regarding what happens *after* there has already been FTC certification plus the 45 day post-notification period.

[4] Black's Law Dictionary 1080 (6th ed. 1990) defines the term "Of Counsel", in pertinent part, as follows (emphasis ours):

> A phrase commonly applied in practice to the counsel employed by a party in a cause, *and particularly to one employed to assist in the preparation or management of an action*, or its presentation on appeal, but who is not the principal attorney of record for the party.

Indeed, the FTC appears to have exercised its Sec. 56(a)(1) supervisory authority by maintaining its "Of Counsel" status on the initial complaint, as well as during later stages of these proceedings.

The actions of the parties and the FTC, as reflected in the record, are consistent with our interpretation of Sec. 56(a)(1): This statute gives the FTC the post-45-day-period authority to "commence, defend, or intervene in, and supervise the litigation of", but does not expressly bar the Attorney General from filing suit for, violations of the FTC Act. Unlike the language used in Sec. 56(a)(2), the "may" language in Sec. 56(a)(1) indicates that the FTC has the right to exercise this authority; there is no indication that the right to commence litigation is granted exclusively to the FTC. The language of the statute is not ambiguous in this regard.

We hold that 15 U.S.C. Sec. 56(a)(1) does not prohibit the Attorney General from commencing litigation under the FTC Act after the statute's 45 day period, as long as the Attorney General's action is not in derogation of the rights granted to the FTC. In the instant case, the Attorney General has not filed this action in contravention of the FTC's 15 U.S.C. Sec. 56(a)(1) rights. Accordingly, the district court erred in dismissing the complaint.

The district court judgment is REVERSED, and the case is remanded for further proceedings.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. **94-10908**

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

RESTLAND FUNERAL HOME, INC.,
a corporation, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(July 6, 1995)

Before JONES, DUHÉ, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/ Carl E. Stewart
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10908

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

RESTLAND FUNERAL HOME, INC.,
a corporation, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

(Filed Jul. 12, 1995)

Before JONES, DUHÉ and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellees for clarification of the court's May 2, 1995, opinion is DENIED.

/s/ J
/s/ D
/s/ CES
6/30/95

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. RESTLAND FUNERAL HOME, INC., a Corporation, ET AL., Defendants.	)	CIVIL ACTION NO. 3:91-CV-2576-G (Filed Aug. 4, 1994)

MEMORANDUM ORDER

Before the court is the defendants' motion to dismiss for lack of subject matter jurisdiction. For the reasons stated below, the motion is granted.

I. BACKGROUND

In this case, the United States ("the government") is alleging several thousand violations by the defendants of a rule of the Federal Trade Commission ("FTC") relating to the funeral industry, 16 C.F.R. § 453.1 *et seq.* ("the Funeral Rule"). The complaint seeks recovery of civil penalties and injunctive relief under 15 U.S.C. § 45(m) and § 53(b) of the Federal Trade Commission Act ("the Act"). This suit was filed by the Attorney General on December 3, 1991, after he was authorized by the FTC to do so on August 22, 1991. *See* United States Opposition to Defendants' Motion to Dismiss, Declaration of Donald S. Clark ("Clark Declaration"), Exhibit A.

In the over two and a half years this case has been pending, many interesting and complex issues have been raised. The basis for this motion, however, is devastatingly simple. The defendants argue that under the statutes governing suits on behalf of the FTC, the Attorney General has power to bring suit for only forty-five (45) days after being authorized by the FTC to do so. Thereafter, the defendants maintain, the exclusive authority to bring suit for alleged violations of the Act rests with the FTC.

The court agrees.

II. ANALYSIS

All actions filed in federal court to enforce the provisions of the Act are governed by 15 U.S.C. § 56. Section 56 sets out the procedures by which the FTC may bring suit in its own name or confer authority on the Attorney General to bring suit. It provides in pertinent part:

> **§ 56. Commencement, defense, intervention and supervision of litigation and appeal by Commission or Attorney General; procedure for exercise of authority to litigate or appeal; certification by Commission to Attorney General for criminal proceedings**
>
> **(a)(1)** Except as otherwise provided in paragraph (2) or (3), if –
>
> > **(A)** before commencing, defending, or intervening in, any civil action involving sections 41 to 46 and 47 to 58 of this title (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is

> authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and
>
> **(B)** the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;
>
> the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

The defendants cite *Top Value Meats, Inc. v. Federal Trade Commission*, 586 F.2d 1275, 1282-83 (8th Cir. 1978), and *United States v. St. Regis Paper Company*, 355 F.2d 688 (2d Cir. 1966), for the proposition that the FTC, not the Attorney General, has exclusive authority to determine whether suit should be brought and what remedies are to be sought. Although *St. Regis Paper Company* involved an earlier version of the statute, the court agrees with the defendants' interpretation of it and finds its reasoning to be persuasive. Under that reasoning, the court concludes that § 56(a)(1)(B) divests the Attorney General of authority to commence suit unless he does so within 45 days after receipt of the notification from the FTC provided for by § 56(a)(1)(A). *See St. Regis Paper Company*, 355 F.2d at 699; *Top Value Meats, Inc.*, 586 F.2d at 1283 (statutes such as the Act imposing statutory penalities [sic] should be construed with some strictness). The court cannot exercise jurisdiction over a case under the Act unless the

government strictly complies with the procedures prescribed by Congress. *Top Value Meats,* 586 F.2d at 1282.

In the case at bar, the government's knowledge of the requirements of § 56 is evidenced by the notification letter itself. Clark Declaration, Exhibit A. In the last full paragraph of the written notification of authority to file suit against the defendants, the chairman of the FTC requests the Attorney General to return to the FTC the documents related to the case if the Attorney General decides not to act within the 45 days prescribed by law. *Id.*

The government argued that the language at the end of § 56(a)(1), which states that "the Commission may commence . . . such action . . . in its own name" if the Attorney General does not file suit within the 45 days after notification, allows either the FTC or the Attorney General to bring suit after the 45 day period. In the opinion of the court, however, this is exactly the kind of situation that § 56 was intended to prevent. In *St. Regis Paper Company,* the court noted that the FTC alone is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress. *St. Regis Paper Company,* 355 F.2d at 697 (*citing Moog Industries, Inc. v. Federal Trade Commission,* 355 U.S. 411, 413 (1958)). Section 56 was designed to prevent a "dual system of surveillance and enforcement" involving both the FTC and the Attorney General. *St. Regis Paper Company,* 355 F.2d at 697.

The government is correct in stating that the court should endeavor to interpret § 56 in light of the purpose that Congress sought to serve by its enactment. *Chapman*

v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979). To interpret § 56 as proposed by the government, however, would turn the statute on its ear and thwart the purposes intended by Congress, which was to create a clear division of responsibility so as to avoid a dual system of surveillance. *St. Regis Paper Company*, 355 F.2d at 697.

Under F.R. Civ. P. 12(h)(3), "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." As the Fifth Circuit has noted, "[f]ederal courts, both trial and appellate, have a continuing obligation to examine the basis for their jurisdiction. The issue may be raised by the parties, or by the court *sua sponte*, at any time." *MCG, Inc. v. Great Western Energy Corporation*, 896 F.2d 170, 173 (5th Cir. 1990). The complaint alleges jurisdiction on the basis of 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and 15 U.S.C. §§ 45(m)(1)(A), 49, 53(b), and 56(a). Because compliance with § 56b(a) is a prerequisite to jurisdiction under Title 15, the government's allegation of jurisdiction necessarily fails.

In addition to their points regarding failure of jurisdiction, the defendants argue that the government is impermissibly seeking reformation of consumer contracts under 15 U.S.C. § 57b(b). They also assert that under § 45 of the Act, the government's claim for civil penalties should be dismissed because the FTC never certified an amount to be sought. While the defendants cite persuasive authority for both positions, the court declines to rule on these contentions. Since the court does not have jurisdiction over this case, any further rulings would be merely advisory.

III. CONCLUSION

Because the jurisdictional prerequisites for bringing suit have not been fulfilled, the court is without jurisdiction over this case, and the defendants' motion must be **GRANTED.** This case is accordingly **DISMISSED.**

Any relief not expressly granted is **DENIED.**

SO ORDERED.

August 4, 1994.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. RESTLAND FUNERAL HOME, INC., a Corporation, ET AL., Defendants.	)	CIVIL ACTION NO. 3:91-CV-2576-G (Filed Aug. 4, 1994)

JUDGMENT

This judgment is entered pursuant to F.R. Civ. P. 58 and the memorandum order of this date. For the reasons stated in that memorandum order, it is **ORDERED** that plaintiff's claims are **DISMISSED.**

August 4, 1994.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX F

H.R.Rep. No. 1107, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7731-33.

MAGNUSON – MOSS WARRANTY – FEDERAL TRADE COMMISSION IMPROVEMENT ACT

* * *

HOUSE REPORT NO. 93-1107

* * *

SECTION 204 – REPRESENTATION

As noted earlier in this report, Public Law 93-153 (the Alaska Pipeline Act) amended sections 5 and 16 of the Federal Trade Commission Act to authorize the Commission to be represented in its own name by any of its attorneys designated by it in any civil action after notifying and consulting with the Attorney General and giving him 10 days to take the action proposed by the Commission. Additionally, if the Commission believes that any person, partnership, or corporation is liable to a penalty under section 5(1) or section 14, it may certify the facts to the Attorney General whose duty it is to cause appropriate proceedings to be brought or after having formally notified and consulted with and given the Attorney General 10 days within which to take the action proposed by the Commission, the Commission could itself cause appropriate action to be brought by its own attorneys.

As reported to the full committee from the Subcommittee on Commerce and Finance, the legislation would have authorized the FTC to appear after notice to the Attorney General in any civil action in its own name and through its own legal representative for the purpose of enforcing laws subject to its jurisdiction.

The FTC in a letter to Chairman Staggers dated March 11, 1974, supported the subcommittee's proposal and stated its position with regard to the provisions relating to representation in the Alaska Pipeline Act as follows:

> Section 206 would add to Section 5 of the Act, 15 U.S.C. § 45, a new subsection (m) which clearly authorizes the Commission, after notification to the Attorney General, to appear in any of its civil litigation through its own legal representative. The Commission supports enactment of Section 206.
>
> The Commission's present authority is contained in Sections 5(m) and 15 of the Act, 15 U.S.C. §§ 45(m) and (56), as amended by Section 408(d) and (e) of Public Law 93-153, and in certain respects differs from Section 206. Section 5(m) is a general provision which allows the Commission to represent itself "after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission." Section 16 contains a separate procedure with respect to civil penalty actions. Specifically, Section 16 requires the Commission to "(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought . . . ; or (b) after compliance [with the general provisions of section 5(m)], itself cause such appropriate proceedings to be brought."
>
> We believe that the recently enacted amendments to the Federal Trade Commission Act may give rise to some confusion as to the appropriate roles of the Commission and the Department of Justice. The Commission, as an independent law

enforcement agency, favors Section 206 of H.R. 7917 because it would clarify our relationship to the Executive Branch by assuring that its litigation is conducted in the manner best calculated to achieve the agency's enforcement goals.

In practice the Commission almost always has represented itself before the courts, and because the Commission's attorneys have the experience and expertise that attends familiarity with the agency's business, the Commission has achieved a commendable record. Because the independence of this expert agency is so important to enforcement of the nation's consumer protection and antitrust laws, the Commission fully endorses Section 206 of H.R. 7917.

In the course of its markup of H.R. 7917, Chairman Staggers received a letter from the Assistant Attorney General for Legislative Affairs which addressed this question. In pertinent part it states:

We differ strongly with the Commission with respect to its support for section 206 of the proposed legislation, which would authorize the Commission to supervise, and in its discretion to conduct its own civil litigation. While the Commission is, in a sense an "independent law enforcement agency," as it describes itself, its law enforcement is based upon an administrative process rather than a judicial process. The kinds of orders which the Commission issues in enforcing the statutes for which it is responsible are not essentially different from the kinds of orders which other regulatory commissions and agencies issue in enforcing their statutes. When it becomes necessary to enforce agency orders in judicial proceedings, the Department of Justice

has generally been responsible for management of the litigation on behalf of the Government. This is but part of the Department's overall responsibility for the supervision and conduct of government litigation in the federal courts. See 28 U.S.C. 516. Performing this function, Department attorneys are well equipped by training and experience to make law enforcement judgments. As litigator for other federal departments and agencies, this Department can insure that the government maintains consistent positions on matters of common interest to all government agencies. Moreover the Department, through the local United States Attorneys, is able to establish effective continuing relationships with the various federal courts which maximize the government's prospects for successful law enforcement.

It is also somewhat misleading to suggest that "in practice the Commission almost always has represented itself before the courts." The Department has never hesitated to call upon Commission attorneys for assistance in presenting the government's position when it concluded that such presentation could best advance that position, but supervision and control of the litigation has remained the law enforcement responsibility of Department attorneys. This division of responsibility has worked well in the past, and should be maintained.

The Department's role in conducting litigation on behalf of the Federal Trade Commission has been considerably clouded by enactment of sections 408(d) and (e) of Public Law 93-153, which appear to authorize the Commission to initiate and conduct civil litigation in its own

behalf after giving the Attorney General ten days to take proposed action for the Commission. Apparently the Commission is no more satisfied with the relationship thus created than is the Department. The proper solution to problems created by hasty and incomplete consideration of the Federal Trade Commission amendments to the Trans-Alaska Pipeline legislation, we believe, is repeal of sections 408(d) and (e) of Public Law 93-153. This was also the position stated by the President in reluctantly accepting these provisions only because of the Nation's pressing need for legislation authorizing construction of the pipeline.

The Department strongly opposes enactment of section 206 of H.R. 7917.

Your committee believes that litigation on behalf of the United States Government requires coordination through a single department or agency of the United States. To do otherwise would result in hopeless confusion and ofttimes lead to the undesirable result of various departments and agencies of the Federal Government taking conflicting positions on issues of public policy. Traditionally, the Attorney General has coordinated and controlled litigation on behalf of the United States.

* * *

S.Conf.Rep. No. 1408, 93rd Cong., 2nd Sess. (1974), *reprinted in* U.S.C.C.A.N. 7702, 7769-71.

CONFERENCE REPORT NO. 93-1408

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

* * *

SECTION 204 – REPRESENTATION

Both the Senate bill and the House amendment contained provisions relating to the Commission's authority to represent itself through its own legal representatives in civil proceedings before courts of the United States.

Senate bill

The Senate bill granted to the Commission the authority to elect to appear in its own name through its own attorneys in any civil proceeding involving the Federal Trade Commission Act whenever it was authorized or required to appear in a court of the United States or to be represented therein by the Attorney General of the United States.

House amendment

The House amendment authorized the Commission with the concurrence of the Attorney General, to appear in any civil action in its own name and through its own legal representative for the purpose of enforcing the laws subject to its jurisdiction.

Conference substitute

The Conference substitute grants to the Commission exclusive authority to appear in its own name through its own legal representatives and to supervise the litigation in any of the following civil actions:

> (1) those under section 13 (relating to injunctive relief);
>
> (2) those under section 19 (relating to consumer redress);
>
> (3) those to obtain judicial review of a rule prescribed by the Commission or cease and desist order issued under section 5; and
>
> (4) those under the second paragraph of section 9 to enforce a subpena [sic], or under the fourth paragraph of section 9 to require compliance with section 6 of the Act.

The Commission may authorize the Attorney General to appear in these actions. The Commission is to inform the Attorney General of the exercise of its exclusive authority and this exercise by the Commission does not preclude the Attorney General from intervening on the behalf of the United States in these actions or any appeal of these actions as is otherwise provided for by law.

In any other civil action involving the Federal Trade Commission Act, the Commission may appear in its own name through its own legal representatives only if the Commission gives written notification and undertakes to consult with the Attorney General and thereafter the Attorney General fails within 45 days after receiving such notification to commence, defend, or intervene in such action.

With respect to the Commission representing itself before the Supreme Court, the conference substitute provides that if the Commission makes a written request to the Attorney General, within the ten-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if the Attorney General concurs with such request; or if the Attorney General, within the 60-day period which begins on the date of the entry of such judgment, refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period, or the Attorney General fails to take any action with respect to the Commission's request.

The conference substitute further provides that, in any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General cannot agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

The conference substitute states that if, prior to the expiration of the 45-day period specified in paragraph (1) of this section or the 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court

with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General will have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1), or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action, pursuant to paragraph 3(A)(ii).

The conference substitute repeals section 5(m) of the Federal Trade Commission Act.

Senators Stevens and Beall (who were Senate conferees) had the following views with regard to section 204:

The expansion of traditional litigating authority of the Federal Trade Commission contained in this legislation (Sec. 204) will not continue the process of centralizing the authority of the Attorney General over litigation involving the United States Government. It has been the long-standing policy of the Executive Branch that representation of Federal agencies in court should be with the supervision and control of the Attorney General. That policy as it applied to the FTC was modified in the amendments to the Federal Trade Commission Act which were contained in the Alaska Pipeline Act. However, those amendments did not specifically alter the relationship of the Department of Justice, particularly the Solicitor General, to Supreme Court litigation involving the United States. It is premature to determine that this

departure from the traditional role of the Department of Justice should be extended to the Supreme Court.

* * *

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120 Cong.Rec. 40711, 40712-13 (Dec. 18, 1974)

* * *

This legislation also gives important new authority to the Commission to enforce the various provisions of the Federal Trade Commission Act. For instance, a violation of the rule promulgated by the Commission may result in civil penalties and an obligation by the wrongdoer to redress injury cost to consumers. Knowing violations of outstanding Commission cease and desist orders may also result in civil penalty, and in the case of a person against whom such orders are issued, the order may trigger an obligation to redress consumer injury.

This legislation also clarifies the current situation with respect to the Commission's ability to represent itself in court proceedings. While at the moment the Alaska Pipeline Act appears to grant the Commission unbridled authority to represent itself after giving 10 days notice to the Attorney General in all matters, including those matters before the Supreme Court, this legislation will somewhat restrict those powers and clarify the Commission's self-representation authority.

It gives the Commission the right to represent itself exclusively in situations where speed is important – such

as injunctions and subpena [sic] enforcement proceedings. In other fairly routine circumstances, it gives the Attorney General the right to represent the Commission if he acts within a reasonable period of time. And, in those circumstances which are routine but where the Commission's vital interests are at stake – as for example in many appellant proceedings and in Supreme Court proceedings – it gives the Commission the right to control its own destiny.

* * *

To help assure the independence of the Federal Trade Commission, the bill authorizes the Commission to represent itself in court. When pursuing consumer redress, seeking injunctions, or participating in judicial review or subpena [sic] and report requirement enforcement actions the Commission can appear in its own name without concurrence of the Attorney General. In other litigation situations the Commission is required to notify the Attorney General who has 45 days to decide whether he – the Attorney General – will pursue the case. If he decides not to pursue the case, the Commission is free to represent itself in court in those other situations.

In addition to the consumer redress and self-representation improvements, the Federal Trade Commission is authorized to seek civil penalties for knowing violations of the Federal Trade Commission Act.

* * *